

**Testimony of Montana Association of Realtors® (MAR)
Senate Natural Resources Committee
61st Session of the Montana Legislature
PROPONENT OF Senate Bill No. 120**

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING CONTROLLED GROUND WATER LAWS; GRANTING RULEMAKING AUTHORITY; ALLOWING PETITIONS FROM LOCAL ENTITIES; PRIORITIZING FUNDING AND STUDIES; REVISING CRITERIA FOR DESIGNATING OR MODIFYING A CONTROLLED GROUND WATER AREA; EXPANDING CONTROL PROVISIONS; REMOVING PREFERENCES FOR DOMESTIC AND LIVESTOCK WITHDRAWALS; ELIMINATING GROUND WATER SUPERVISORS; REMOVING PENALTIES ASSOCIATED WITH NONCOMPLIANCE WITH GROUND WATER STATUTES; AMENDING SECTIONS 85-2-306, 85-2-402, 85-2-501, 85-2-506, AND 85-2-508, MCA; REPEALING SECTIONS 85-2-507, 85-2-509, 85-2-511, 85-2-513, 85-2-518, AND 85-2-520, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Dear Chairman Gebhardt and members of the Committee:

For the record, my name is Abigail St. Lawrence, and I represent the Montana Association of Realtors® ("MAR"). MAR represents over 4,600 real estate brokers, property managers, salespersons, and affiliates throughout Montana and is the business advocate for Montana real estate professionals, representing practitioners active in all phases of real estate brokerage, management, development, and appraisal. MAR has discussed several proposed amendments with the Montana Department of Natural Resources and Conservation ("DNRC") that MAR believes could take a good bill and make it even better. However, MAR does support SB 120 because it is a step in the right direction of improving current problematic controlled groundwater area ("CGWA") statutes.

As just about anyone who has been involved in a CGWA petition under current statute will tell you, the process is broken. As few as 20 or one-quarter of water users within a proposed CGWA, whichever number is less, can initiate the petition process by presenting DNRC with a petition for a CGWA containing nothing more than unsubstantiated fears of water shortages, despite the fact that Mont. Code Ann. § 85-2-311 (1)(b) requires any applicant for a new permit for beneficial water use (*i.e.*, any new water right permit) to demonstrate that existing water rights will not be adversely affected. *See*, Mont. Code Ann § 85-2-506(2). All too often, CGWA petitions are used as a backdoor mechanism to stop or severely limit responsible development when a few very vocal opponents have failed in all other avenues. Because the petition requirements in present law are so minimal and the process so ill-defined, even if the petitioners are not ultimately successful in getting a permanent CGWA designated, they can still quite successfully grind all development to a halt for a very long time and require homeowners trying to get their water to expend significant time, energy, and money to combat a baseless petition.

Even beyond the waste of private resources, current law also sets up a situation where DNRC often ends up expending significant time and personnel and financial resources on undertaking studies to determine if a permanent CGWA is necessary. First, because the procedure for conducting a hearing on a CGWA petition is ill-defined under current law, DNRC is required to “reinvent the wheel” for each new petition, coming up with *ad hoc* procedure that rarely is satisfactory to all parties involved. Further, because the hearing often resembles more of a free-for-all than anything else, with no party knowing who else may show up until the hearing is actually underway, the hearings can be unproductive, costly in terms of both time and money, and cumbersome for all parties, both private folks and DNRC.

Under Mont. Code Ann. § 85-2-507(5)(a), if after hearing the petition for a CGWA, DNRC “finds that sufficient facts are not available to designate or modify a permanent controlled ground water area, the department may designate the area in question to be a temporary controlled ground water area.” The purpose of a temporary CGWA is to allow DNRC the time to conduct a study of the area and obtain facts necessary to determine if a permanent CGWA is warranted. *See*, Mont. Code Ann. § 85-2-507(5)(b). However, study is not the only characteristic of a temporary CGWA. Rather, the order designating a temporary CGWA can and often does include corrective control provisions and limitations on withdrawals during the existence of a temporary CGWA. *See*, Mont. Code Ann. § 85-2-507(5)(a). In other words, even though DNRC does not have facts before it to support designation of a permanent CGWA, it can impose almost all the restrictions and requirements of a permanent CGWA while it goes about gathering information to determine if a CGWA is warranted, resulting in significant restrictions and, in some cases, all out prohibition, on water use without any basis in fact.

SB 120 is a significant step towards improving the CGWA process for all involved. First and foremost, SB 120 improves the quality of CGWA petitions to DNRC by setting standards for a correct and complete petition, which must include analysis prepared by a hydrologist or other qualified professional and must describe proposed mitigation measures to address the allegations of reductions in recharge, excessive withdrawals, or adverse impacts to groundwater quality. *See*, Sec. 5(3)(a). This is an important step forward in two respects. First and foremost, setting a minimum bar that petitions must reach will help to resolve the “shoot first” mentality promoted under current law, which allows petitioners to initiate the CGWA process without attempting or even proposing any mitigation efforts to address their concerns. Second, by setting a bar for petitions to be supported by scientific evidence rather than factually-thin allegation, SB 120 will save both DNRC and private concerned parties untold amounts of time and money currently expending in dealing with petitions that are based on little more than emotion and conjecture rather than hydrologic fact.

While SB 120 raises the bar on what a petition must contain, it does not leave petitioning parties to fend for themselves in gathering the scientific data required for a petition. Instead, SB 120 limits those entities that can submit a petition for a CGWA to DNRC to state or local public health agencies to address identified public health risks or municipalities, counties, conservation districts, or local water quality districts. *See*, Sec. 5(2)(b)-(c). These local government entities can work with concerned citizens to develop a petition that can be accepted by DNRC, utilizing resources that individual citizens do

not have at their disposal (such as certain grants that local governments are eligible for to gather the information necessary to put together a petition) while also giving local governments a way to respond to citizen concerns regarding water use and quality. However, SB 120 also protects local governments from having to respond to frivolous applications for petitions by granting local governments the authority to establish criteria for acceptance of an application to petition DNRC. *See*, Sec. 7.

SB 120 also resolves the significant problem under current law of temporary CGWAs, which currently result in a "cloud" on land within the temporary CGWA by imposing restrictions similar to those under a permanent CGWA, but without facts sufficient to support designation of a permanent CGWA. SB 120 allows a temporary CGWA to be designated for the purposes of study only and specifically prohibits the control provisions of a permanent CGWA, except for measurement and reporting, from being required within a temporary CGWA. *See*, Sec. 5(6)(b). Further, SB 120 prioritizes studies in temporary CGWAs for funding under the renewable resource and grant loan program, thereby promoting timely completion of the study and, ultimately, more timely resolution of petitions. *See*, Sec. 5(6)(e).

While SB 120 is a marked step in the right direction of remedying the current dysfunction in the CGWA statutes, SB 120 could be made even better. MAR is concerned with the authority granted to DNRC in SB 120 to initiate designation of a CGWA on its own accord. *See*, Sec. 5(2)(a). Given the limitations that can be imposed on new groundwater development through designation of a permanent CGWA, MAR believes that such limitations should be imposed only after very careful study and public consideration and deliberation. MAR believes that the public petition process provides a much better check on government power and would prevent potential abuse of rulemaking authority. For that reason, MAR proposes amendments, attached hereto, that would limit DNRC's rulemaking authority to prescribing petition requirements and the petition process.

The bottom line is that SB 120 does improve a process that, at present, is severely dysfunctional. With MAR's proposed amendments, SB 120 would improve that process without introducing new concerns over broad grants of power to state agencies. Please recommend a "do pass" on Senate Bill No. 120 and consider MAR's proposed amendments. Thank you, and I will be available for any questions.

AMENDMENTS TO SENATE BILL NO. 120
(Introduced Bill)
(amendments proposed by Montana Association of Realtors®)

1. Page 10, line 20 through line 22
Following: "for the purpose of"
Strike: "implementing 85-2-506 and other controlled ground water area statutes."
The rules must include but are not limited to" on line 22
Insert: "prescribing"
Following: "controlled ground water areas" on line 22
Insert: "pursuant to 85-2-506."
2. Page 10, line 25
Following: "The department may"
Strike: "by rule"
3. Page 10, line 27
Strike: "rule"
Insert: "final order of the department"
4. Page 10, line 28
Following: "(2)"
Strike: "The rulemaking process for designation"
Restore: "Designation"
5. Page 10, line 30
Following "the department"
Restore: "on its own motion, by"
Insert: "publication as required by subsection (4)(c)"
6. Page 11, line 25
Following: "When the department"
Strike: "proposes a rule pursuant to this section"
Insert: "on its own motion or in response to a correct and complete petition submitted pursuant to this section begins the process of designation or modification of a permanent or temporary controlled groundwater area, the department shall hold an contested case hearing pursuant to Title 2, chapter 4, part 6, and"
7. Page 12, line 6
Following: "180 days"
Insert: "of receipt of a petition"
8. Page 12, line 7
Following: "180 days"
Insert: "of receipt of a petition"

9. Page 12, line 17
Following: "the petition"
Strike: "for rulemaking"
10. Page 12, line 18
Following: "(c)"
Strike: "In addition to the notice requirements of Title 2, chapter 4, parts 1 through 4, the"
Insert: "The"
11. Page 12, line 19
Following: "public notice of the"
Strike: "rulemaking"
Insert: "contested case"
12. Page 12, line 21
Following: "30 days before the"
Strike: "date of the hearing"
Insert: "deadline for notice of participation in the hearing as provided for pursuant to subsection (5)(a)"
13. Page 12, line 27
Following "30 days before the"
Strike: "hearing"
Insert: "deadline for notice of participation in the hearing as provided for pursuant to subsection (5)(a)"
14. Page 13, line 12
Following: "basis for the"
Strike: "proposed rule."
Insert: "petition. If designation or modification of a temporary or permanent controlled ground water area is initiated by the department on its own motion, the notice shall include a statement of those criteria in subsection (5) that are met. ~~and the evidence that the department relies on as support for its decision.~~"
15. Page 13, line 14
Following: "interested persons."
Insert: "(i) The notice shall also include the deadline by which all parties intending to appear at the contested case hearing must provide notice to the department of their intent to appear, which deadline shall be no less than 120 days before the hearing."
(ii) Within five business days of the deadline for notices of intent to appear, the department shall compile a list of the names and addresses of all parties filing a notice of intent to appear and shall serve by mail a copy of the list on all parties filing a notice of intent to appear."

16. Page 13, line 18

Following: "controlled ground water area"

Strike: "by rule"

Insert: "following a contested case hearing"

17. Page 14, line 9

Following: "The department shall"

Insert: "prepare and publish a notice of rulemaking in which the department shall"

18. Page 15, line 15

Following: "the requirements"

Restore: "of an order issued"

Insert: "or"